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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-1240

* * *

DAN WEISER, ET AL.,
Petitioner

V.

HONORABLE MARK WHITE, JR.,
SECRETARY OF STATE OF THE
STATE OF TEXAS,
Respondent

* * *

On Petition For a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

OPINION BELOW

The Opinion of the District Court is set forth as

Appendix A of the Petition. The Opinion of the Court of Appeals for the Fifth Circuit is unreported and set forth in Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS HAD JURISDICTION TO ENTERTAIN AN APPEAL FROM AN ORDER OF A DULY CONVENED THREE-JUDGE COURT DENYING A REQUEST FOR AN AWARD OF ATTORNEY'S FEES ANCILLARY TO THE MAIN ACTION AND PROPERLY BEFORE THE THREE-JUDGE COURT.

STATUTE INVOLVED

Title 28, United States Code, Section 1253 provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from any order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges."

Title 28, United States Code, Section 1291 provides in pertinent part:

> "The courts of appeals shall have jurisdiction of appeals from all final decision of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

STATEMENT

On June 17, 1971, Senate Bill 1 passed by the 62nd Legislature of the State of Texas was signed into law by the Governor of the State of Texas. This Bill contained the congressional redistricting for the State of Texas. Suit was instituted on October 18, 1971, by Petitioner Dan Weiser, et al., on behalf of himself and all others similarly situated as citizens and voters of the State of Texas, to declare Senate Bill 1 unconstitutional and invalid as a violation of their rights under Article I, Section 2, United States Constitution and the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs sought to enjoin elections for Congress under the districts contained in Senate Bill 1. A three-judge court was convened and on January 22, 1972 declared Senate Bill 1 unconstitutional in that it contained impermissible variations in population among the congressional districts and therefore contravened Article I, Section 2 of the United States Constitution. The Court adopted an alternative plan for congressional apportionment which had been urged by Plaintiffs, referred to as Plan C. The Defendant appealed, and the Supreme Court noted jurisdiction.

On June 18, 1973, this Court affirmed the lower court's declaration that the congressional districts as drawn in Senate Bill 1 were unconstitutional, but reversed that portion of the judgment adopting Plan C and remanded the case to the lower court for further proceedings. White v. Weiser, 412 U.S. 783 (1973).

On remand Petitioner requested an award of attorney's fees and in addition a number of motions were submitted to the three-judge court requesting leave to intervene. After a hearing the three-judge court issued its opinion on October 17, 1973, holding that the Supreme Court had mandated the adoption of Plan B, an alternative plan originally submitted but later abandoned by the Petitioners, that Intervenors' applications were untimely, that costs be taxed against the Defendant, and denied Petitioners' motion for award of attorney's fees.

Appeals were taken to the Court of Appeals for the Fifth Circuit by Petitioner and proposed Intervenor Washington, et al., from that part of the order denying attorney's fees and denying the intervention, respectively. The appeals were consolidated by the Court of Appeals. Proposed Intervenor Washington, et al., undertook a direct appeal to this Court, which was dismissed "for want of an appealable order". Washington v. White, 416 U.S. 964 (1974).

The Fifth Circuit dismissed the consolidated appeal for lack of jurisdiction under 28 U.S.C. 1291 and 28 U.S.C. 1253.

ARGUMENT

I. THE FIFTH CIRCUIT COURT OF APPEALS DID NOT HAVE JURISDICTION TO ENTERTAIN AN APPEAL FROM AN ORDER OF A DULY CONVENED THREE-JUDGE COURT DENYING A REQUEST FOR AN AWARD OF ATTORNEY'S FEES ANCILLARY TO THE MAIN ACTION AND PROPERLY BEFORE THE THREE-JUDGE COURT.

Pursuant to 28 U.S.C. Section 2281, a three-judge court was required to consider the constitutionality of the Texas plan for congressional districts and Petitioners' request for injunctive relief. On direct appeal to this Court from the order granting injunctive relief, the case was remanded to the three-judge court for further proceedings consistent with the opinion. On remand one of the issues raised by Petitioner for consideration by the three-judge panel was a request for an award of attorney's fees. Consideration of this issue by the panel was appropriate and proper as stated by the Fifth Circuit Court of Appeals in Haining v. Roberts, 453 F.2d 1223, 1224 (5th Cir. 1971) cert. denied, 406 U.S. 948 (1972);

> "It was appropriate that the three-judge court decide both the attorney fee and the back pay claims. They are not even separate legal issues but simply aspects of the overall relief sought by the appellant based solely on the claim of wrongful discharge."

The instant claim for attorney's fees is part of and

based on the original injunction request. It is no more than an "aspect of the overall relief" sought by the Petitioner on his constitutional claim. Petitioner bases his entitlement to attorney's fees on the single "private attorney general" theory. Such an award on this basis, rather than the traditional contractual or statutory grounds, is inherently intertwined with the merits of the constitutional claim.

On remand, no question was raised as to the propriety or necessity of the three-judge panel's consideration of the issues then before it. Petitioner at no time requested that the three-judge court dissolve itself and only one judge consider the merits of his request for an award of attorney's fees or any other issue. It must be assumed then that Petitioner himself was of the opinion that a decision on his request was properly before and should be decided by the three-judge panel as previously held in Haining, supra.

Petitioner mistakenly relies on Perez v. Ledesma, 401 U.S. 82 (1971) and Public Service Commission v. Brashear Freight Lines, 312 U.S. 621 (1941), hereinafter referred to as Brashear II, to support his contention. In the instant case, this Court remanded the original action to the three-judge court for further proceedings consistent with the opinion. The panel was therefore instructed to take some further action. Petitioners' additional request for an award of attorney's fees was proper under the circumstances.

To put Brashear II, supra, in proper perspective, the circumstances leading up to the issuance of

that opinion must be examined. A three-judge panel was originally convened to consider a petition for an injunction against the enforcement of a state statute. The action of the three-judge panel was terminated with the filing of its opinion and order in the first proceeding. An appeal from that order was dismissed for lack of jurisdiction by this Court in Public Service Commission v. Brashear, 306 U.S. 204 (1939), hereinafter referred to as Brashear I. There was no further action to be taken by that three-judge court; no mandate of this Court to be followed. After the dismissal of the appeal, the Public Service Commission, in effect, filed a new suit for damages with the three-judge court, even though the original ruling of that court clearly indicated that an independent action was the proper course for the Public Service Commission to obtain relief:

> " 'That the issue raised by the Defendants' counterclaim, not having been urged nor presented by the parties, and the Court being in doubt as to the right of the Defendants to maintain such a counterclaim, it is ordered that the same be and it hereby is dismissed without prejudice to the right of the Defendants, or either of them, to maintain an independent action or suit thereon, if they, or either of them, shall be so advised;' " Brashear I, supra, page 206.

As pointed out in the opinion of this Court in Brashear II, a dismissal of the three-judge panel would have been proper, with the merits of the claims for damages to be decided by one judge only.

312 U.S. at 625. The taking of an appeal from the second order of the three-judge panel denying the requested relief to the Circuit Court of Appeals rather than the United States Supreme Court was proper. As pointed out by this Court in Brashear II, the original dismissal by the three-judge panel was without a hearing on the merits. 312 U.S. at 626. This type of decision is one of the very limited areas in which an order of a three-judge court is properly reviewable by the appropriate court of appeals rather than by direct appeal to the United States Supreme Court. 9 Moore's Federal Practice Sec. 110.03(3), page 7677 (1973). In contrast, the three-judge panel in the case at bar considered and ruled on the merits of the issue, which issue was part and parcel of the original proceedings.

In Perez v. Ledesma, supra, the order sought to be reviewed on direct appeal and dismissed for want of jurisdiction by the United States Supreme Court was one entered by a single judge on the constitutionality of a local ordinance. The lack of Supreme Court jurisdiction on direct appeal in this instance is classic in nature. The issue of constitutionality of a local ordinance was not even properly before the three-judge court, as that court recognized by the entry of the order regarding the ordinance by a single judge only.

Petitioner also erroneously relies on Perez to support his contention that the "issue of entitlement to attorney's fees is entirely separate from the merits of the case which involves the constitutionality of congressional districting in the State of Texas and thus affords no 'independent jurisdictional basis.' "

(Petition, page 6.) As stated above the issue of attorney's fees, especially on the theory which Petitioner claims entitlement--private attorney general --and in the posture of this litigation was far from entirely separate from the merits of the injunction proceedings. Haining v. Roberts, supra. As such, the "independent jurisdictional base" requirement of Perez is wholly inapplicable especially when the controversy between parties there was centered on an ordinance complete in itself and totally separate from the challenged State law.

Even if Petitioner's contention that the attorney's fees issue in the context of this case was wholly separate from the merits of the injunction proceeding and required an independent jurisdictional base for consideration by a three-judge court were correct, it was his burden to request that the issue be determined by a single judge, or, in the alternative, to take a direct appeal to this Court. If the three-judge court had no jurisdiction, this Court alone had the ability on a direct appeal to vacate the order of the three-judge court with instructions to enter a new order by a single judge regarding attorney's fees.

Petitioner himself cites Professor Moore as to the many problems which have surrounded appellate review from three-judge court actions (Petition, page 8). Professor Moore, however, also admonishes an appellant that ". . . the safe course is to file an appeal in both the Supreme Court and the Court of Appeals whenever there is any doubt about the necessity for a three-judge court." 9 Moore's Federal Practice Sec. 110.03(3) page 83 (1973).

The prudence of taking such appeals has also been cited by the Court of Appeals for the Fifth Circuit. Mayhue's Super Liquor Store, Inc. v. Meiklejohn, 426 F.2d 142 (5th Cir. 1970). Proposed Intervenors Washington, et al. were aware of and heeded such admonitions. Petitioner chose to ask this Court to correct his mistake, not the mistake of the Court below. It is not the responsibility of the Court of Appeals or of this Court to render such assistance and the Petition for Writ of Certiorari should be denied.

II. THE OPINION OF THE COURT BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT, THE COURT BELOW, OR OTHER COURT OF APPEALS.

Petitioner contends that the holding of the court below conflicts with Perez v. Ledesma, Brashear I, and Brashear II. Brashear I merely stands for the proposition that the appellant had no standing to pursue a direct appeal to the United States Supreme Court from the decree of a three-judge court which denied an injunction as requested by Appellant. The case does not touch in any way the question of whether the Court of Appeals would have had jurisdiction to entertain the appeal. The fact that the appellant in that case attempted to pursue further proceedings for relief in the three-judge district court rather than the Circuit Court of Appeals, as discussed in Point I, supra, further points out that the holding in the Supreme Court was not regarded as conferring jurisdiction on the Circuit Court.

Perez and Brashear II are equally distinguish-

able from and not inconsistent with the instant case as discussed in Point I above.

Nor does this case conflict with Lee v. Macon County Board of Education, 429 F.2d 1218 (5th Cir. 1970). The Court of Appeals for the Fifth Circuit itself has resolved the jurisdictional questions between Lee and the instant case. In Lee the Court stated:

> "The orders appealed from are those of the three-judge District Court, i.e., the order of that Court dated March 16, 1970 (modified March 23, 1970) in the Anniston case, and the order of that Court dated March 26, 1970 in the Tuscaloosa case. It is appropriate that these appeals from the three-judge District Court be heard by this Court of Appeals which has jurisdiction rather than the Supreme Court, since there are no proceedings here concerned with the constitutionality of a state statute, and no 28 U.S.C. Sec. 2281 issues involved. See 28 U.S.C. Sec. 1291; 28 U.S.C. Sec. 1253. Cf. United States v. State of Georgia, et al. (Charlie Ridley, Jr., et al., Intervenors), 5 Cir., 1970, 428 F.2d 377." Lee v. Macon County Board of Education, supra, p. 1219, footnote 2.

As set out in Point I, supra, in Haining v. Roberts, supra, a case identical to the instant one, the court held that the issues to be resolved were a part of the injunction suit required to be heard by the three-judge court. The Court of Appeals was therefore

without jurisdiction to entertain an appeal from the order of the three-judge court.

Finally, the posture of Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974) petition for cert. filed, is totally different from that of the instant case. In that case, a three-judge court was convened pursuant to 28 U.S.C. Sec. 2281 to consider the constitutionality of a plan reapportioning the Ohio Legislature. On December 3, 1971, that three-judge panel ruled the plan unconstitutional, and no appeal was taken from the decision. On April 19, 1972, Petitioner moved for an award of counsel fees and expenses. The matter was referred to the original district court judge, Chief Judge Battisti, who ordered the payment of attorney's fees by the Defendants on May 19, 1972. On February 22, 1973, Defendants moved to vacate previous orders of the single judge, which motions were overruled on June 12, 1973. That order of a single judge was properly appealed to the Sixth Circuit. See Jordan v. Gilligan, (Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, pages 4, 5, 1a, 2a, and 3a). The Sixth Circuit, therefore, had no jurisdictional questions to consider.

III. THE ISSUE OF AN AWARD OF ATTORNEY'S FEES IN THIS CASE PRESENTS NO SUBSTANTIAL CONSTITUTIONAL QUESTION.

Peititoner's request for an award of attorney's fees as stated above was based on the private attorney general theory. The three-judge court denied this request solely on the basis that an award of at-

torney's fees is discretionary and the facts of the case did not support an award of attorney's fees. (Petition, page A7) Petitioner is not claiming that he has a constitutional right to attorney's fees pursuant to the private attorney general theory. Although Petitioner implies that this case involves the legality of awarding attorney's fees under the private attorney general theory in light of the Eleventh Amendment to the United States Constitution, (Petition, page 9) no such important policy and constitutional consideration exist in this case. Based on the clear holding of the three-judge panel, even if the Eleventh Amendment to the United States Constitution is held not to prohibit an award of attorney's fees against the State, Petitioner would not be entitled to such an award on the facts of this case.

CONCLUSION

For the foregoing reasons, Respondents pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

ELIZABETH LEVATINO
First Special Assistant Attorney General

ATTORNEYS FOR RESPONDENT
P. O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Elizabeth Levatino, First Special Assistant Attorney General of the State of Texas, certify that a true and correct copy of the foregoing Brief for Respondent in Opposition has been served upon counsel by mailing same, postage prepaid, to: Mr. Ben L. Krage, Rosenberg, Kasmer & Willingham, 2300 Main Tower, 1200 Main Street, Dallas, Texas 75202; Mr. Lawrence Fischman, Weil, Craig & Fischman, 2400 Adolphus Tower, Dallas, Texas 75202

on this the _____ day of May, 1975.

ELIZABETH LEVATINO